Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JENNINGS WATER, INC.,
Petitioner,

v.

CSL UTILITIES, INC. and CSL COMMUNITY ASSOCIATION, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

7 U.S.C. § 1926(b) is part of a statutory scheme to promote the organization of rural water service associations and it prohibits the curtailment of the association's service by the inclusion of its service area within the boundaries of "any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan." The question presented is:

During the life of a federal loan, does 7 U.S.C. § 1926(b) prohibit a private water utility, which is a pre-existing wholesale customer of a federally indebted rural water association, from acquiring an alternative water supply to serve the utility's retail customers located within the rural water association's service area?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Jennings Water, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals appears at 16 F.3d 130 (7th Cir. 1993) and appears in Appendix A as App. 1a-14a. The opinion of the District Court for the Southern District of Indiana appears at 807 F. Supp. 490 (S.D. Ind. 1992).

JURISDICTION

The judgment of the Court of Appeals was entered on December 15, 1993. The petitioner's motion for a rehearing was denied on February 25, 1994 and the Court's

December 15, 1993 opinion was modified as appears in Appendix B as App. 15a-16a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The facts are set out in the two previous Court of Appeals decisions in this case. *Jennings Water, Inc. v. City of North Vernon*, 895 F.2d 311 (7th Cir. 1989) (*Jennings I*) and *Jennings Water, Inc. v. CSL Utilities, Inc. and CSL Community Association, Inc.*, 16 F.3d 130 (7th Cir. 1993) (*Jennings II*). The case arose under a federal statute, 7 U.S.C. § 1926(b), and the United States District Court for the Southern District of Indiana, Indianapolis Division, had subject jurisdiction matter pursuant to 28 U.S.C. § 1331.

Jennings Water Company (Jennings) is a rural not-for-profit water association formed in 1975 by the merger of two rural water companies, Geneva Township Water Corporation (Geneva) and Muscatatuck Water, Inc. (Muscatatuck). Both Geneva and Muscatatuck were financed by loans granted by the Farmers Home Mortgage Administration (FmHA) pursuant to 7 U.S.C. § 1926. In 1977, Jennings assumed Geneva's initial loan of one hundred eighty-one thousand dollars ($181,000) and obtained an additional loan, with a forty year term, to expand its water treatment, storage and distribution facilities. Jennings currently serves 2000 customers in Jennings County, Indiana. As of 1989, Jennings' outstanding indebtedness to the FmHA was "just under $1.5 million." 895 F.2d at 313.

CSL Utilities (CSL) is Jennings' largest customer. CSL is a private investor owned utility company and serves only the residents of Country Squire Lakes, a subdivision in Geneva Township in Jennings County. CSL serves 300 permanent and 850 seasonal residents. In 1974, CSL began purchasing water from Geneva and continued to purchase water from Jennings after the merger.

CSL refused to a sign a $100,000.00 water purchase agreement requested by the FmHA as a condition for the FmHA-Jennings loan. However, since its formation, Jennings has continued to provide CSL with all of its water on a month to month basis. 895 F.2d at 313.

The controversy that led to the present litigation began in 1986 when Jennings notified CSL that Jennings would seek a rate increase from the Indiana Public Service Commission. After the Indiana PSC approved a substantial rate increase, CSL entered into an agreement with the city of North Vernon, Indiana to purchase a substitute supply. After consultation with the FmHA, Jennings objected to the completion of the North Vernon-CSL water main and the proposed purchase agreement because its revenue base would be significantly eroded. The District Court for the Southern District of Indiana enjoined the sale of water to CSL because 7 U.S.C. § 1926(b) prohibits municipal encroachment of the service area of a rural water association during the term of the loan. *Jennings Water, Inc. v. City of North Vernon*, 682 F. Supp. 421 (S.D. Ind. 1988). The Seventh Circuit Court of Appeals affirmed. *Jennings Water, Inc. v. City of North Vernon*, 895 F.2d 311 (7th Cir. 1989) (*Jennings I*).

During the appeal in *Jennings I*, CSL decided to pursue an alternative strategy to obtain a substitute water supply. It filed a complaint in the United States District Court for the Southern District of Indiana seeking a declaratory judgment that 7 U.S.C. § 1926(b) permitted the construction of its own reservoir, purification and distribution system to serve its retail customers. On August 9, 1988, *Jennings* filed a motion to dismiss arguing that the district court opinion in *Jennings I* barred the complaint because it was res judicata and collaterally estopped CSL. After the District Court denied Jennings motion to dismiss, CSL filed a motion for summary judgment and Jennings filed a cross motion for summary judgment.

Jennings' cross motion was granted by the District Court. On December 15, 1993 the Seventh Circuit Court of Appeals reversed the District Court. *Jennings Water, Inc. v. CSL Utilities, Inc. and CSL Community Association, Inc.*, 16 F.3d 130 (7th Cir. 1993) (*Jennings II*); App. 1a-14a.

The Court of Appeals held that CSL was within Jennings' service area because all previous retail and wholesale customers served by an association at the time of its formation are within its service area. The Court of Appeals also held that CSL's decision to discontinue purchasing water from Jennings occurred "during the term of such loan," as defined in 7 U.S.C. § 1926(b). In doing so, the Court of Appeals held that though CSL was incorporated in 1974 prior to the creation of Jennings, Jennings' assumption of a predecessor association's 1965 loan brought Jennings within the scope of the statute's protection. However, the Court of Appeals held that the statute does not prohibit a wholesale customer from improving its own facilities to serve at retail because allowing the new service "would not confer a right to serve new customers or to provide a different service." 16 F.3d at 136; App. 11a.

STATUTE INVOLVED

7 U.S.C. § 1926(b) Curtailment or limitation of service prohibited

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by

the association at the time of the occurrence of such event.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW INCORPORATES AN UNWARRANTED MARKET COMPETITION POLICY INTO 7 U.S.C. § 1926(b) WHICH UNDERMINES THE PURPOSE AND SCOPE OF THE STATUTE AND IS INCONSISTENT WITH THE DECISIONS OF ALL OTHER COURTS OF APPEAL AND DISTRICT COURTS INTERPRETING 7 U.S.C. § 1926(b)

7 U.S.C. § 1926(b) protects rural water associations indebted to the Federal Government by creating a pervasive scheme of entry barriers to allow the association to sustain itself financially so that it can discharge its federal debt obligation. The statute creates no express exemptions to permit the entry of competitors to serve the rural water association's customer base at the time it became indebted to the Federal Government. However, the Court of Appeals decision below read the statute to allow a court to decide when to permit new entrants into the utility's market to prevent unfair hardships on competing utilities. This assertion of judicial discretion is unwarranted by the language and purpose of the statute. The Court of Appeals decision below undermines the purpose of the statute. Ad hoc judicial entry standards discourage the formation of rural water associations by increasing the risks that they will be unable to meet their federal debt service obligations. The decision of the Court of Appeals is also a major departure from both general principles of public utility law, reflected in 7 U.S.C. § 1926(b), which justify the imposition of entry restrictions on competing utilities, prior lower court decisions interpreting the purpose and scope of the statute and this Court's statutory construction jurisprudence.

Sections 1921 to 2006 of Title 7 of the United States Code create a federal loan program administered by the

Farmers Home Administration (FmHA) to promote agriculture and rural development. The FmHA "is an agency within the Department of Agriculture providing credit to those unable to get credit from other sources at reasonable rates and terms." Julian Conrad Juerensmeyer and James Bryce Wadley, AGRICULTURAL LAW § 14.4 (1982). Section 1926 provides a federal loan program for a variety of water and soil conservation programs including the organization of rural water associations. Title 7 is an exercise of the Federal Government's spending power. The FmHA is acting in a sovereign capacity when it makes loans to rural water associations. *Somerville Technical Services v. United States*, 640 F.2d 1276, 1281 (Ct.Cl. 1981).

In 1961, the loan program was extended to rural water associations serving non-farm residents. Rural water associations are authorized to serve both farm and rural residential customers. When Congress extended the loan program, it enacted Section 1926(b) of Title 7. This section is the linchpin of the federal loan program because it protects both the Federal Government's interest in the timely repayment of its loans and the utility's provision of reliable and safe water supplies for domestic consumption and use by the intended program beneficiaries. These purposes are served by the standard rationale for public utility regulation: sufficient economies of scale exist in the provision of an essential service so that the relevant market is best served by a single entity. Entry restrictions must only be reasonably related to some plausible governmental interest. *New Motor Vehicle Board of the State of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

Section 1926(b) protects the service area of a federally indebted rural water association by prohibiting competing utilities from offering alternative service. The section mandates that the service provided by these associations "shall not be curtailed or limited by the inclusion of the area served by such association within the boundaries of

any municipal corporation or other public body, *or by the granting of any private franchise for similar service within such area during the term of such loan.*" 7 U.S.C. § 1926(b). Our emphasis. Congress enacted the section "to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system." 2 U.S. Code Cong. & Admin. News, 87th Cong., pp. 2309 (1961).

The Seventh Circuit found the entry restriction an "extreme application" of Section 1926(b) because the statute only protects indebted utilities from competition from non-customer third parties and drew a distinction between the creation of a new franchise and the exercise of an existing one. The rationale for this narrow and novel reading of the statute is not fully articulated. The apparent rationale is that by failing to be more explicit, Congress impliedly exempted wholesale customers who seek to improve their own facilities "so as to reduce the amount of water it must purchase wholesale," 16 F.3d at 136; App. 10(a). The opinion below found that this form of service competition is not encompassed in the statutory prohibition against new service which injures a federally indebted association. The supporting reasons appear confined to (1) an assertion in footnote no. 2 that "[*i*]*n general*, we think that a franchise to serve at retail carries with it power to vertically integrate to provide for water supply." (emphasis added), 16 F.3d at 136, App. 10(a), and (2) the unsupported conclusion that a contrary construction of the statute would impose "a significant and seemingly unfair hardship upon the utility by denying it the right to develop its own facilities to service its existing customers more economically." 16 F.3d at 137; App. 14(a).

The Seventh Circuit's distinction and rationale is inconsistent with prior circuit court decisions, general principles of public utility law and this Court's rules of statu-

tory construction. The Fourth, Fifth, Tenth and Seventh Circuit Courts of Appeal (*Jennings I*) have interpreted Section 1926(b) to protect a federally indebted association's pre-existing territory from all subsequent competition. The facts of the cases happen to involve non-customer third parties. None of the cases contain any suggestion that the association's protection from competition is limited to this situation. Nor do they contain any suggestion that an association's protection depends on the timing of a competing utility's decision to serve the association's customers. CSL's proposed water production, treatment and service facilities within a federally indebted rural water association's service area are prohibited within the meaning of 7 U.S.C. § 1926(b) regardless of whether it is labeled new or expanded. The statute expressly protects an association from all utility competition, public or private if a federally indebted rural water association will experience service curtailment during the life of the loan. As the Seventh Circuit stated in *Jennings I*, "section 1926(b) . . . absolutely bars any encroachment by a competing water system on a rural water system indebted to the FmHA." 895 F.2d at 318, n.6.

Previous courts of appeal decisions have held that the efforts by other water service utilities to supplant a rural water association or to compete with it must be strictly limited during the term of the loan in order to carry out the two major interests sought to be advanced by the statute. First, the statute seeks to provide reliable and safe service to rural water users. Second, the statute ensures that the indebted utility's financial ability to repay the federal loan will not be impaired. *City of Madison, Mississippi v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987).

Previous courts of appeal have rejected literal readings of the statute and instead have used general principles of public utility law to interpret the statute to achieve these purposes. This is consistent with this Court's continued adherence to the rule that a statute must be construed

with reference to its language, structure, object and policy. *U.S. National Bank of Oregon v. Independent Insurance Agents of America*, —— U.S. ——, 113 S.Ct. 2173, 2182 (1993). For example, the Fifth Circuit Court of Appeals held that a city can not condemn a substantial percentage of a utility's customers and facilities even though Section 1926(b) does not expressly prohibit condemnation. "The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water associations services resulting from municipal annexation or inclusion." *City of Madison, supra* at 1059. The Tenth Circuit Court of Appeals reached a similar conclusion. *Glenpool Utility Services v. Creek County Rural Water District*, 861 F.2d 1211 (10th Cir. 1988), cert. denied, 490 U.S. 1067 (1989).

Federal district courts have also read the statute broadly and have not limited it to protection from municipal third parties. The United States District Court for the Northern District of Oklahoma has characterized the purpose of the statute as the protection of associations from "competitive facilities," especially those which would be developed as a result of the expansion of the "neighboring municipalties or other public bodies into an area served by the rural water association." *Rural Water District # 3 v. Owasso Utilities Authority*, 530 F. Supp. 818, 823 (N.D. Okla. 1979). Consistent with the broad competition protection mandate of the statute, federal district courts have rejected the necessity to prove actual economic prejudice from a specific anti-competitive decision. Furthermore, the statute prevents the "piecemeal erosion" of the area served by a rural water association. *Moore Bayou Water Association v. Town of Jonestown*, 628 F. Supp. 1367, 1370 (N.D. Miss. 1986).

Prohibiting a federally indebted rural water association's wholesale customer from serving its customers with an alternative water supply is consistent with accepted public utility theories which deny new competitors entry into a protected market. 7 U.S.C. § 1926(b) contains no invita-

tion to courts to fashion a federal common law of competition promotion. To the contrary, an indebted utility is exempt from the Sherman Act because of the "state action" exemption. *Pinehurst Enterprises, Inc. v. Town of Southern Pines*, 690 F. Supp. 444 (M.D.N.C. 1988), aff'd, 887 F.2d 1080 (4th Cir. 1989). Prior to the decision of the Court of Appeals below, courts have assumed that an association is protected from all direct and indirect service competition with its customers. For example, the United States District Court for the Northern District of Oklahoma has held that a second utility may only enter an association's service area where it provides water for a use not provided for by the association. *Rural Water District # 3 v. Owasso Utilities Authority*, 530 F. Supp. 818, 823 (N.D. Okla. 1979) (fire protection).

The construction of the statute to prevent a franchised utility from entering an association's service area is consistent with accepted principles of public utility regulation which are incorporated into the statute. CSL desires to enter Jennings' service area because it perceives an opportunity for "cream skimming." Because of its compact proposed service area, CSL may provide service at a lower cost. The ability of a second service provider to exploit a small, particularly profitable niche of a utility's larger service area has been characterized as "cream skimming" because the new entrant is not burdened with the first provider's large fixed costs incurred in order to serve a larger area. Ernest J. Gellhorn and Richard J. Pierce, Jr., REGULATED INDUSTRIES pp. 281-283 (1982). The net result is to impose higher rates on the remaining customers of the first provider. This Court has long held that the prevention of "cream skimming" is a valid basis for Congressional legislation to deny or to regulate market entry. See the concurring and dissenting opinions of Mr. Justice Frankfurter in *Atchison, Topeka & Santa Fe R. Co. v. Reddish*, 368 U.S. 81, 135 (1961); *Interstate Commerce Commission v. J-T Transport Company*, 368 U.S. 81, 95 (1961) (Frankfurter J., dissenting). Con-

gress made an explicit decision to prohibit all competing service for the life of the loan. 7 U.S.C. § 1926(b) is not a statute intended to promote competition in rural water service during the life of a federal loan; it is a statute intended to attract and finance monopolies in "thin" rural markets.

The Seventh Circuit's recognition of a market entry interest in CSL is both contrary to the purpose of 7 U.S.C. § 1926(b) and previous circuit courts of appeal decisions interpreting it. CSL is a public utility. This Court has previously held that a proprietary water service company becomes a public utility when it is "devoted to supplying a large community with a prime necessity of life." *Van Dyke v. Geary*, 244 U.S. 39, 47-48 (1917) (interpreting Arizona law). Thus, CSL is entitled only to service rights recognized by statute or the Constitution. Any state-created rights that CSL can claim are limited by 7 U.S.C. § 1926(b). The statute confers no express or implied service rights on competing utilities. No constitutional right exists. In *Glenpool Utility Services, supra* at 1215, the Tenth Circuit Court of Appeals dismissed the argument that a FmHA loan to a rural water association unconstitutionally contracts away a property interest in a competing utility. The decision of the Court of Appeals below also found CSL's constitutional arguments without merit. 16 F.3d at 137, fn. 3; App. 14a.

II. THE DECISION BELOW UNDERMINES THE FEDERAL GOVERNMENT'S ABILITY TO SECURE REPAYMENT OF ITS LOAN TO NOT-FOR-PROFIT ASSOCIATIONS AND IS THUS INCONSISTENT WITH THIS COURT'S CONSISTENT EFFORT TO FACILITATE THE COLLECTION OF FEDERAL DEBTS AND TO AFFORD THE FEDERAL GOVERNMENT THE PROTECTIONS FROM UNASSUMED FINANCIAL RISKS AND BURDENS PROVIDED BY THE CONSTITUTION AND THE COMMON LAW

When the FmHA makes a loan to a rural water association, an ordinary mortgagor-mortgagee relationship is created between the FmHA and the association. 7 U.S.C. § 1927(c).* The association executes a mortgage to the FmHA and obligates itself to repay the loan over forty years. The Federal Government has the usual powers of a mortgagee to ensure the repayment of its loan. As mortgagee, the FmHA is entitled to protection against increases in repayment risks subsequent to the execution of the mortgage. For example, to protect mortgagees from interest rate declines, there is no common law right to prepay a mortgage. George E. Osborne, Grant S. Nelson and Dale A. Whitman, REAL ESTATE FINANCE LAW § 6.1 (1979). The protection of the FmHA's repayment interest is especially important in this loan program because the Secretary of Agriculture is primarily limited to loans in areas with cities of less than 10,000 inhabitants, 7 U.S.C. § 1926(a)(7), and thus these loans carry a higher risk compared to loans for utilities in more densely populated areas.

The FmFA and an association assume the risk of a fluctuating customer base as individual customers choose to discontinue service. However, these are small risks inherent in any public utility service and substantially different from the risk imposed by the decision of the

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* The Court may wish to solicit the views of the Federal Government on the impact of the Seventh Circuit's decision on FmHA loans to rural water associations throughout the country.

Court of Appeals below. The FmHA and an association are not required to assume the risk that additional utilities will be authorized to compete in the service area. *City of Madison, supra.* This post-loan risk impairs the association's repayment capability and the FmHA's ability to obtain repayment as Congress intended. The Court of Appeals conclusion that CSL was not granted a new franchise but only sought to exercise its pre-existing one in a "particular (and new) fashion" creates a distinction which impairs both the association's repayment capability and the FmHA's interest in timely repayment. The FmHA has an interest in maintaining the level of repayment risk that existed at the time of the loan. Without any foundation in legislative history or prior judicial interpretations of 7 U.S.C. § 1926(b), the Seventh Circuit has converted a statute intended to preserve the *status quo* into a market entry regime that allows private developers to compete with the association within its service area during the federal loan term.

By its failure to observe this basic distinction in public utility law, the Seventh Circuit creates a federal common law of competition in contravention of Congress' desire to prevent competition for the life of the federal loan. This invitation to use the statute as a basis for a new federal common law is inconsistent with the many decisions of this Court which seek to protect the integrity of the federal fisc from state and judicial intrusions which are inconsistent with congressional mandates. To protect the federal government's interest in debt recovery, this Court follows a presumption that Congress intended to give federal agencies ample power to collect debts owed them. In *United States v. Texas*, 113 S.Ct. 1631 (1993), for example, this Court recently held that the Debt Collection Act of 1982 does not preclude the United States from collecting prejudgment interest on a debt incurred through participation in the Food Stamp Program because "The Act was designed "[t]o increase the efficiency of Government-wide efforts to collect debts owed to the United

States . . . ." 113 U.S. at 1636. This Court further noted that a contrary reading "would have the anomalous effect of placing delinquent States in a position where they had less incentive to pay their debts to the federal government than they had prior to its passage." *Ibid.*

The decision of the Court of Appeals below creates a similar anomaly because it invites the creation of a federal common law of exceptions to the market entry prohibition mandates of the statutes dealing with relations between the Federal Government and persons indebted to it. Thus, the precedent progressively increases the Federal Government's risk of default above that which it assumed at the time that it extended the loan. Federal judicial protection of the FmHA's repayment interest is especially necessary under this program because the structure of the program does not include repayment protections found in other federal loan programs. For example, under the Reclamation Act of 1902, before reclamation water or contract rights are transferred, the Department of Interior's practice is to interpret Bureau of Reclamation contracts to allow project beneficiaries to transfer project rights provided that the transferee assumes the transferor's repayment obligations. 3 WATERS & WATER RIGHTS § 160.03 (b)(2) (R. Beck ed. 1991).

This Court has consistently guarded the public fisc by requiring an express showing of congressional waiver of sovereign immunity to allow states to assess fees against the Federal Government. In the 1992-93 term, this Court reaffirmed that the McCarran Amendment waives the sovereign immunity of the United States for both state adjective law and the substantive law of water rights. However, the Amendment's waiver does not extend to state filing fees because "[a]s to monetary exactions . . . we have been particularly alert to require a specific waiver of sovereign immunity . . . ." *United States v. Idaho, ex rel. Director, Idaho Department of Water Resources,* —— U.S. ——, 113 S.Ct. 1893, 1897 (1993); see also *United States Department of Energy v. Ohio,* 112 S.Ct.

1627, 1633 (1992). The decision of the Court of Appeals below is counter to this fundamental principle inherent in sovereign immunity. In the absence of the specific congressional intent to subject the United States to fiscal liability as required by this Court, the Seventh Circuit has opened the door to a series of judicial exceptions to a strong congressional mandate that the federal interest in loan repayment requires that federally indebted rural water associations should be protected from competition during the life of the loan. As the Court of Appeals for the Tenth Circuit noted in *Glenpool Utility Services*, Section 1926(b) protects "federal funds advanced under the congressional spending power and pursuant to a national policy concerned with water management and rural populations." 861 F.2d 1211 at 1215.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 92-3026

CSL UTILITIES, INCORPORATED and
CSL COMMUNITY ASSOCIATION, INCORPORATED,
Plaintiffs-Appellants,

v.

JENNINGS WATER, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
No. 88 C 1151—Sarah Evans Barker, *Judge*

ARGUED JANUARY 13, 1993—
DECIDED DECEMBER 15, 1993

Before CUDAHY, FLAUM, and MANION, *Circuit Judges.*

CUDAHY, *Circuit Judge.* The plaintiff, a nonprofit water utility company, seeks a declaratory judgment that its planned development of a water system does not violate the federal statutory scheme that provides for the extension of loans to certain rural water associations and protects such associations from infringement upon their

services. The defendant, a rural water association indebted to the government under the loan program, contends that the plaintiff's system would encroach on the defendant's service and thus curtail it under the terms of 7 U.S.C. § 1926(b). The parties filed cross motions for summary judgment and the district court, concluding that the plaintiff's plans constituted a violation of section 1926 (b), granted the defendant's motion for summary judgment and denied the plaintiff's. We reverse.

I.

The defendant, Jennings Water, Inc., is a rural nonprofit water association in Jennings County, Indiana. It was formed in 1975 through the merger of two local rural water companies, Geneva Township Water Corporation and Muscatatuck Water Corporation, that were financed by loans from the federal Farmers Home Administration (FmHA). Jennings assumed those loans—which in Geneva's case dated back to 1965 and in 1977 obtained another loan from the FmHA to connect and expand water treatment, storage, and distribution facilities. The term of the 1977 loan is 40 years.

The plaintiff, CSL Utilities, Inc., is a private nonprofit utility company formed in 1974 to supply water at retail to the residents of a Jennings County subdivision called Country Squire Lakes. Initially CSL was supplied wholesale water by Geneva. In 1977, when Geneva and Muscatatuck merged to create Jennings, Jennings became CSL's supplier. CSL is Jennings' major wholesale customer and has purchased water from Jennings since Jennings' inception.

In March 1987, the Indiana Utility Regulatory Commission approved a substantial rate increase—nearly 100 percent—for Jennings. In response, CSL first attempted to purchase water from neighboring North Vernon, Indiana, but the district court, *see Jennings Water, Inc. v. City of North Vernon*, 682 F. Supp. 421 (S.D. Ind. 1988), and

this court on appeal, *see Jennings,* 895 F.2d 311 (7th Cir. 1989), found that the arrangement would violate 7 U.S.C. § 1926(b). That provision, which is part of a federal statutory scheme to extend loans to certain associations providing water service or management or other essential community services to rural residents, prohibits encroachment on the service provided by rural water associations that hold FmHA loans.

This lawsuit involves CSL's alternative attempt to secure another water source by constructing its own water purification and delivery facility; CSL claims this addition would supplement but not eliminate its purchase of water from Jennings. CSL completed the necessary engineering studies, filed an application to build the facility, and sought a declaratory judgment that the development of the water system to serve Country Squire Lakes residents would not violate section 1926(b).

Both CSL and Jennings fiied motions for summary judgment. The district court denied CSL's motion and granted Jennings' motion. While the district court and this court in the initial suit rejected CSL's arrangement with North Vernon on the basis of section 1926(b)'s language prohibiting curtailment "by inclusion of the area served by [Jennings] within the boundaries of any municipal corporation or other public body," the district court in the present case held that CSL's plans constituted a violation of another part of section 1926(b), which prohibits curtailment of Jennings' service "by the granting of any private franchise for similar service within such area during the term of such loan." CSL appeals.

II.

The statute at issue, which purports to protect the customer base of rural water associations, provides:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association

> within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b). The application of this statute to preclude a wholesale customer of an association from constructing a facility to provide its own water supply presents close and difficult questions. The private franchise restriction at issue under the statute has three components: (1) the curtailment of the association's service area (2) by a private franchise (3) that was granted during the term of the FmHA loan. On appeal, CSL contests all three of these requisites arguing, *inter alia,* that construction of its proposed water treatment and delivery facility would not curtail the "area served" by Jennings, that construction of a such a facility by an existing utility does not constitute the grant of a private franchise, and that CSL's private franchise was not granted "during the term of such loan." We address each contention separately.

"The Area Served"

CSL's first suit ivolving its arrangement with North Vernon (which we will call *Jennings I*) established that such a deal with a municipality would be a prohibited curtailment "of the area served . . . within the boundaries of any municipal corporation or other public body." 7 U.S.C. § 1926(b). The present case involves the interpretation of a different clause in section 1926(b) that prohibits curtailment "by the granting of any private franchise for similar service within such area during the term of such loan." *Id.*

Although the two clauses address similar but distinct economic concerns, they share the reference to the "area served by [Jennings]." The district court in *Jennings I* explicitly rejected CSL's argument that the Country Squire Lakes subdivision was not in Jennings' (wholesale) service area because it comprised CSL's (retail) service area. 682 F. Supp. at 424. This court affirmed the district court, noting the "uncontroverted evidence establishing that CSL was 'served' by Jennings at the time of the 1977 FmHA loan (and for the following decade)." 895 F.2d at 318.

CSL contends that the inquiry differs in the context of the "private franchise" clause of section 1926(b). The plain terms of the statute contradict that contention, however. While the "municipal corporation" clause prohibits the curtailment or limitation "of the area served by such association," the "private franchise" clause prohibits curtailment by the granting of any private franchise "within *such* area" (emphasis added). The use of the term "such" signifies that the phrase has the same meaning as it does when it is first mentioned in the "municipal corporation" clause.

CSL concedes that construction of the water treatment facility will curtail the amount of water it purchases from Jennings. Even if CSL has no desire or intent to become a permanent part of Jennings' service area or the CSL-Jennings wholesale agreement is purportedly "temporary," it is beyond dispute that CSL and the Country Squire Lakes residents are presently in Jennings' wholesale service area and are, in addition, served by Jennings for the purposes of the "private franchise" clause as well as of the "municipal corporation" clause. The issue here is not so much the scope of the service area as it is the right of a wholesale customer serving at retail to improve its own facilities to curtail or eliminate the need for wholesale supply. We address that difficult issue below.

"During the Term of Such Loan"

In this connection, the second of three prerequisites to establishing a violation of the "private franchise" clause is that the curtailment result from the granting of a private franchise. We will explore the "granting of a private franchise" in greater depth below, but temporarily CSL might have been granted a franchise at its incorporation and may be given a franchise upon receiving authorization to improve its facilities. CSL originally was granted a private franchise at its incorporation in December 1974. There is a dispute whether CSL was granted this franchise "during the term of [the FmHA] loan"—the third requirement. According to CSL, its private franchise falls outside the language of section 1926(b) because it was granted before the term of the 1977 FmHA loan to Jennings and in fact before Jennings even existed. Jennings counters that its assumption of the Geneva loan predating CSL's franchise entitles it to section 1926(b)'s protection; in the alternative, or at least seemingly so, Jennings argues that the presently contemplated construction of CSL's water facility—more specifically, the state agencies' approval that is required to build and finance the water treatment facility—constitutes the granting of a private franchise that unquestionably occurred during the term of Jennings' own FmHA loan.

We turn first to the assumption issue. On October 21, 1977, after Geneva and Muscatatuck merged to create Jennings, Jennings assumed Geneva's FmHA loans, which dated back to November 1965.[1] CSL contends that it

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[1] The assumption agreement provides:

> The provisions of said debt and security instruments and of any outstanding agreements executed or assumed by the present debtors pertinent thereto shall, except as modified herein, remain in full force and effect, and the assuming parties hereby assume the obligations of and agree to be bound by and to comply with all covenants, agreements and conditions contained in said instruments and agreements, except, as modified herein, the same as if they had executed them as of the dates

cannot possibly be poised to violate section 1926(b) when *Jennings'* 1977 loan, as opposed to Geneva's loans that Jennings assumed, was secured after CSL became a private franchise. This formalistic interpretation finds no support in the language of section 1926(b) and contravenes the statute's purposes to encourage rural water development by expanding the number of potential users and to safeguard the financial viability of rural associations and FmHA loans. *See Jennings I*, 895 F.2d at 315 (citing *City of Madison v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987)). The absence of any textual reference to assumption of loans tends to support the conclusion that such a transfer does not alter the statute's scope of protection rather than CSL's view that it does. We agree with the observation of the court below that CSL fails to explain "why an agreement between the FmHA and an association to make a loan is an operative event for analyzing section 1926(b) but an agreement between the FmHA and an association to assume a loan should have no effect." Order at 8. Thus, CSL was granted a private franchise during the term of Jennings' loan from the FmHA.

"The Granting of any Private Franchise for Similar Service"

This brings us to what we believe is the key issue before us. Will the curtailment that is contemplated here result from the "granting of any private franchise for similar service?" If we assume that the "private franchise" involved here is the one granted at the formation of CSL in 1974, that franchise did not curtail anything at the

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thereof as principal obligors, including any obligation to pay the Government an insurance charge in addition to interest, if and as provided in any such instrument.

. . . .

This agreement shall be subject to present regulations of the Farmers Home Administration and to its future regulations which are not inconsistent with the express provisions hereof.

time. In fact, it brought another wholesale customer into the fold served at the time by Geneva and later by Jennings.

On the other hand, we might see the 1974 franchise grant as the basis for the presently proposed improvement of CSL's facilities so that CSL can provide most of its own raw water. It seems far-fetched, however, to attribute to the 1974 franchise grant, which originally increased the demand for water, a "curtailment" when CSL proposes to improve its own facilities. Instead we might hypothesize that CSL will be granted some new "franchise" when it receives regulatory authority to improve its own facilities. The basic question, it seems to us, is whether this grant of regulatory authority in the 1990s—which indubitably is the event producing the curtailment, if there is one—is in the words of the statute "the granting of any private franchise for similar service."

In ordinary parlance, we would say that it is not. The "granting of any private franchise for similar service" suggests a grant to a third party (competing) supplier—not merely the granting of permission to a wholesale customer to improve its own facilities. The granting of a franchise may mean different things in different contexts, principally because the term "franchise" is not amenable to precise definition. *See* Joseph Joyce, A Treatise on Franchises § 9, at 19 (1909) ("[T]he word 'franchise' has various meanings, and it is difficult to define the term as used under constitutions and statutes, since, as a rule, it is a question of construction in each particular case precluding any definition applicable to all cases."); 36 Am. Jur. 2D *Franchises* § 1, at 722 (1968) ("Many attempts have been made to define it, and there is not a little variation in the terms used."); 37 C.J.S. *Franchises* § 1a, at 142-43 (1943) ("The term 'franchise' has been used in various senses."). Generally speaking, a franchise may be defined as a privilege granted by the government to a company or individual to transact a particular kind of business, as in the case of a privilege granted to a water-

works company to supply a municipality with water and to collect water rates for the use of the water supplied. *See* Paul J. Garfield & Wallace F. Lovejoy, Public Utility Economics 28 (1964). We think the franchise contemplated by section 1926(b) is the privilege *to serve customers*. This conclusion is suggested by, among other things, the fact that the word "franchise" is modified by the phrase "for similar service." The question is, "Similar" to what? Here we think the phrase means similar to the service provided to customers by a rural water association within its service area. The statute forbids encroachment on the water association's service area in either of two ways: (1) through expansion of a municipal or other public water system or (2) through introduction of new or expanded service by a private supplier. Thus both clauses of the statute prohibit another supplier (whether public or private) from being substituted for, and from displacing, the service of the rural water association. Now the crucial question before us is whether new or expanded service by a private supplier includes CSL's development of its own water resources to reduce or eliminate its dependence on an outside water source. We do not believe that the language of the statute taken in context reaches this extreme application. *Cf. Jennings I*, 895 F.2d at 318 n.6 ("[S]ection 1926(b) absolutely bars any encroachment by a *competing water system* on a rural water system indebted to the FmHA.") (emphasis supplied); *Pinehurst Enter., Inc. v. Town of Southern Pines*, 690 F. Supp. 444, 452 (M.D.N.C. 1988) (section 1926(b) does not prohibit municipality from providing sewage collection service in area in which FmHA-indebted association provides sewage treatment service because municipality would not be competing with FmHA-indebted association), *aff'd*, 887 F.2d 1080 (4th Cir. 1989).

The cases and fragments of legislative history available to us all seem to have in mind curtailment resulting from substitution of some third party as a water-supplier for Jennings. *See Jennings I*, 895 F.2d at 315 (entity pur-

chasing water from rural association cannot contract with municipality to replace association as its supplier of water); *Glenpool Utilities Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988) (municipality cannot replace rural association as supplier of water by annexing area served by the association), *cert. denied*, 490 U.S. 1067 (1989); *Bear Creek*, 816 F.2d at 1059 (municipality cannot substitute itself as supplier of water for area served by rural association by condemning rural association's facilities); *Moore Bayou Water Ass'n, Inc. v. Town of Jonestown*, 628 F. Supp. 1367, 1370 (N.D. Miss. 1986) (same); S. Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.C.C.A.N. 2243, 2309 [hereinafter Senate Report] ("[Section 1926(b)] has been added to assist in protecting the territory served by . . . [a rural water] association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system."). We are aware that the statute is to be interpreted broadly, *see Jennings I*, 895 F.2d at 315 (citing Senate Report, *supra*, at 2305, 2309), but we think there is no fair implication by which it can be said to reach improvement by a wholesale customer of its own facilities so as to reduce the amount of water it must purchase at wholesale.[2] If Congress had in mind *any* authorized construction or development which would reduce demand for the rural association's water, it could easily have used language broad enough to reach that broadly defined activity.

Jennings essentially takes the position that any change in a water system, *which requires regulatory approval*, and which reduces the demand on the wholesale supplier, is prohibited by the statute. Jennings asserts that the Indiana Department of Environmental Management is required to issue permits to CSL to build the proposed

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[2] In general, we think that a franchise to serve at retail carries with it power to vertically integrate to provide for a water supply.

reservoir and water purification facilities, *see* Ind. Code § 13-7-4-1 (1988 & 1992 Supp.), and that the Indiana Utility Regulatory Commission must issue certificates of construction to CSL authorizing the new facilities, *see* Ind. Code § 8-1-2-86 (1988). According to Jennings, the granting of these permits and certificates amounts to the "granting of a franchise."

Jennings concedes that the digging of wells by a farmer, who is an ultimate water customer (and not a reseller), would not involve the "granting of a franchise" although by using water from his own wells the farmer obviously would reduce overall demand for the rural association's water. But Jennings takes the position that similar activity involving the construction of water purification and delivery facilities by a utility that buys water at wholesale and provides retail water service would entail the granting of a franchise *if regulatory approval were required.* The requirement of approval by a public agency seems to be the *sine qua non.*

We believe this is too broad a reading of the phrase, "granting of any private franchise for similar service." As we have indicated, the grant of a "franchise," as that term is used in section 1926(b), must involve service to customers—either provision of existing service to new customers or provision of new or different service to existing customers. Here the grant to CSL of permission to build additional facilities would not confer a right to serve new customers or to provide a new or different service. The permission to CSL would be to authorize it to provide its accustomed service, but in a somewhat different fashion. Instead of buying all its water from Jennings, CSL would provide some from its own resources. There would be no change in the service received by CSL's retail customers and no new customers would be served.

Moreover, viewed from a slightly different perspective, Jennings' argument confuses the *grant* of a franchise with

the *exercise* of a franchise. The grant of a privilege to serve customers is the grant of a franchise; serving customers by providing them with self-produced water (or water purchased at wholesale) is the exercise of a franchise. *See* Joyce, *supra*, §§ 40, 47-48. CSL was granted its franchise in 1974. Should CSL secure an environmental permit and certificates of construction, it will be able to exercise its franchise in a particular (and new) fashion —by supplying and delivering its own water. But even if CSL is unable to secure the necessary certificates and permit, it will retain its privilege to serve its customers (its "franchise") by supplying them with water purchased from Jennings.

Jennings, of course, argues that from an economic point of view it makes no difference whether CSL buys some of its water from North Vernon or supplies the same amount of water from its own wells—the demand for Jennings' water is equally reduced. But by its plain terms the statute does not apply to *any* change in CSL's water system requiring regulatory approval; it applies only to curtailments resulting from the "granting of any private franchise for similar service." If we were to construe the statute as broadly as Jennings demands, we would be precluding any development by water utilities of their own water resources as long as a government loan were outstanding to their wholesale supplier. Such an onerous restriction could freeze any self-development for many decades. Jennings' interpretation seems to us to be an extraordinary restrictive and anticompetitive reading—one that simply cannot find support in the language of the statute. No doubt the statute is intended to be broadly protectionist, but there are degrees of protectionism which its plain language does not reach.

It may also be argued that CSL has waived the "granting of a franchise" issue. In its reply brief, it states:

> [T]his Court must find that CSL Utilities is a private franchise. As correctly stated by Jennings, CSL Util-

> ities admits this portion of the private franchise restriction.

Reply Br. at 4.

But in its main brief, CSL has a whole point with the heading.

> THE CONSTRUCTION OF A WATER FACILITY BY A UTILITY DOES NOT CONSTITUTE THE GRANTING OF A PRIVATE FRANCHISE.

Appellants' Br. at 14.

Of course, CSL is (or operates under) a private franchise. No one contests this. But the more relevant question is whether the granting of a franchise results in a curtailment of the service provided by Jennings. This issue has not been waived.

As we noted in *Jennings I*, the legislative history of the statute confirms that Congress intended section 1926(b) to be read broadly, 895 F.2d at 315 (citing Senate Report, *supra*, at 2305, 2309), and federal courts construing the statute have accordingly interpreted it liberally to protect FmHA-indebted rural water associations. 895 F.2d at 315 (citing, *inter alia*, *Glenpool*, 861 F.2d at 1214 (section 1926(b) prohibits municipality's encroachment on association's service by annexation of territory) and *Bear Creek*, 816 F.2d at 1061 (section 1926(b) forbids municipal condemnation of association facilities)). This is not to say, however, that a government loan to a rural water association can totally freeze retail water utility development within the indebted association's service area. Some development is permissible even though the granting of a franchise or the inclusion of the service area within municipal boundaries are precluded.

Section 1926(b) is, of course, aimed at suppressing competition with a supplier endowed with public funds. *See, e.g., Rural Water Dist. No. 3 v. Owasso Utilities Auth.*, 530 F. Supp. 818, 824 (N.D. Okla. 1979) (sec-

tion 1926(b) prohibits municipalities' exercise of their powers to sell water "when their exercise would result in competition with a Rural Water District"); Senate Report, *supra*, at 2309 (stating section 1926(b)'s purpose "to assist in protecting the territory served by such an association facility against competitive facilities"). But CSL argues persuasively that the district court's construction of section 1926(b) imposes a significant and seemingly unfair hardship upon the utility by denying it the right to develop its own facilities to service its existing customers more economically. We believe that the language of the statute, while it should be broadly construed, does not, in its present form, support what seems to be such an extreme application.[3]

III.

CSL's contention that the facility's construction does not involve the granting of a private franchise during the term of the loan appears to be dispostive. We therefore REVERSE the district court's grant of Jennings' motion for summary judgment and REMAND for further proceedings.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[3] As to CSL's contention that under the district court's interpretation, section 1926(b) violates the Takings Clause of the Fifth Amendment, we agree with the district court that the argument lacks merit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 25, 1994

Before

Hon. Richard D. Cudahy, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

No. 88 C 1151

No. 92-3026

CSL UTILITIES, INCORPORATED and
CSL COMMUNITY ASSOCIATION, INCORPORATED,
Plaintiffs-Appellants,

v.

JENNINGS WATER, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division

Sarah Evans Barker, Chief Judge

This matter comes before the court for its consideration of Appellee's PETITION FOR REHEARING, Appellant's RESPONSE TO MOTION TO RECONSIDER, and Appellee's REPLY TO APPELLANTS' RESPONSE TO APPELLEE'S PETITION FOR REHEARING. All of the judges on the original panel have voted to deny a rehearing.

Accordingly, IT IS ORDERED that Appellant's PETITION FOR REHEARING is DENIED.

IT IS FURTHER ORDERED that the court's opinion, issued on December 15, 1993, is modified as follows:

The word "nonprofit" is removed from the first line on page one, and is replaced with the words "privately owned."

Peter C. King, Esq.
CLINE, KING & KING
P.O. Box 250
Columbus, IN 17202-250
92-3026

Enclosed is a copy of a document issued by this court in the above captioned case. Since this will be the only copy your firm will receive, if applicable, please circulate this order to other members of your firm who may have an interest in this case.

Supreme Court, U.S.
FILED

931869 MAY 24 1994

OFFICE OF THE CLERK

No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JENNINGS WATER, INC.,
Petitioner,

v.

CSL UTILITIES, INC. and CSL COMMUNITY ASSOCIATION, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
S.D. INDIANA
Indianapolis Division

No. IP 88-1151

CSL UTILITIES, INC., and
CSL COMMUNITY ASSOCIATION, INC.,
Plaintiffs,

v.

JENNINGS WATER, INC. and RICHARD E. LYNG,
Secretary, United States Department of Agriculture,
Defendants.

July 24, 1992

BARKER, District Judge.

Plaintiff CSL Utilities is a privately-owned utility whose only business is providing and selling water to the residents of Country Squire Lakes, a residential subdivision located in Jennings County, near North Vernon, Indiana. Plaintiff CSL Community Association ("Community Association") is a not-for-profit corporation which is comprised of the Country Squires Lakes property owners. Defendant Jennings Water, Inc. ("Jennings"), is a rural not-for-profit water association operating in Jennings County and serving CSL Utilities as one of its customers. Jennings is indebted on loans obtained from the Farmers Home Administration (FmHA) to connect and expand its water services.[1] A detailed discussion of the facts of

[1] In its November 14, 1990 Entry, this court ordered the parties to brief the question of whether the United States Department of Agriculture ("Department") was improvidently dismissed from this action. Having read the parties' submissions, the court con-

this case and the relationship between the parties can be found in this court's November 14, 1990 Entry, and in the Seventh Circuit's opinion in *Jennings Water, Inc. v. City of North Vernon*, 895 F.2d 311 (7th Cir.1989).

By this lawsuit, the plaintiffs seek a declaration that CSL's construction of a water system will not violate 7 U.S.C. § 1926(b), which provides:

> The service provided or made available thorugh any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

The parties do not dispute that Jennings is an FmHA-indebted "association" as that term is used in section 1926(b). In its November 14, 1990 Entry, this court denied Jennings' motion to dismiss on res judicata, collateral estoppel, and Article III justiciability grounds. Currently before the court are the parties' cross motions for summary judgment.

DISCUSSION

The first issue which the court must address is that of ripeness. In its briefs, Jennings raised the argument that this dispute is not ripe for adjudication as required by Article III of the United States Constitution. However, the court determined in its November 14th Entry that this

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cludes that the dismissal of the Department was proper and that no reason exists for compelling an otherwise unwilling Department to reenter this litigation.

dispute was ripe, and that decision is and will remain the law of this case. While Jennings argued in the briefing on the pending summary judgment motions that CSL Utilities had not completed all of the necessary engineering studies to obtain from the state a permit to construct its water system, Jennings did not contest that an application to build a water system had been made by CSL Utilities. The issues in this case are clearly defined, and the "turbulent relationship between Jennings and CSL dating back to the 1977 FmHA loan to Jennings," *City of North Vernon,* 895 F.2d at 313, was remarked upon by the Seventh Circuit in 1989. Jennings has given this court no persuasive reason to consider its decision that this case is ripe for adjudication, and that decision will remain the law of this case.

After sifting through the policy arguments better addressed to a congressperson than a judge and the immaterial or previously resolved points of contention, the key to resolving this dispute emerges and entails an examination of these words from 7 U.S.C. § 1926(b): "during the term of such loan." As noted above, the parties do not dispute that Jennings is an "association" as that term is used in section 1926(b).

Section 1926(b) prohibits the curtailment or limitation of service provided by Jennings. The plaintiffs argue that Jennings' service would not be curtailed because the residents of Country Squire Lakes are customers of CSL Utilities rather than Jennings. The plaintiffs already raised and lost this argument against Jennings in prior litigation. *Jennings Water, Inc. v. City of North Vernon,* 682 F.Supp. 421, 423-424 (S.D.Ind.1988), *aff'd,* 895 F.2d 311 (7th Cir.1989). The plaintiffs are accordingly precluded from raising that issue again in this litigation. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326-327, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979).

The plaintiffs try unsuccessfully to distinguish the prior rulings on this issue by arguing that in this case, the issue

is whether Jennings' service would be curtailed if CSL Utilities provided some of its own water rather than, as was at issue in the prior litigation, purchasing it from North Vernon. How this distinction is material is entirely unexplained by the plaintiffs. It is a particularly unpersuasive distinction where the plaintiffs expressly concede that the amount of water that they purchase from Jennings would be reduced. *See* CSL'S Combined Response to Jennings' Opposition to CSL's Motion for Summary Judgment and Reply to Jennings' Motion for Summary Judgment ("Combined Response"), p. 5. The conclusion is unavoidable that if the plaintiffs purchase less from Jennings, then Jennings' service would be limited or curtailed.

Section 1926(b) does not expressly prohibit all curtailing or limiting of an association's service, however. These limitations are prohibited under Section 1926(b) when they occur "by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan." It seems clear, although it is not essential to this court's holding, that CSL is not a municipal corporation nor a public body. The only argument that Jennings develops on this point is that Community Association is the governing body of Country Squire Lakes and hence is a public body. However, Jennings gave neither case law nor an appropriate citation to the record [2] to support this proposition, and the Seventh Circuit found CSL Utilities to be a private utility in *City of North Vernon,* 895 F.2d at 313. Moreover, it is CSL Utilities, and not Community Association, which

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[2] Apparently to establish both that Community Association is a governing body and that it in turn is governed by an appointed board of directors, Jennings cites a deposition with more than 100 pages plus exhibits attached. That is not acceptable. The court's resources are limited, and they cannot be honored by litigants unwilling to make precise citations to the record.

would be operating the water system and hence curtailing Jennings' service, so the possibility that Community Association might be a public body does not, in and of itself, implicate section 1926(b).

However, section 1926(b) also prohibits the limitation or curtailment of service "by the granting of any private franchise or similar service within such area during the term of such loan." The plaintiffs have conceded that CSL Utilities is a private franchise, *see* Combined Response, p. 7. However, the plaintiffs maintain more particularly that "CSL is a private franchise granted before the term of the 1977 FmHA loan to Jennings." *Id.* at 8.

Thus, the key to resolving this dispute is to determine whether, as required by section 1926(b), CSL Utilities was granted a private franchise "during the term of [an FmHA] loan." CSL Utilities was incorporated on December 17, 1974, and completed its water distribution system in 1975. Plaintiffs' Brief in Support of Motion for Summary Judgment ("Plaintiffs' Brief"), p. 1-2. At that time, CSL Utilities was supplied water by the Geneva Township Water Corp. ("Geneva"), which became indebted on FmHA loans as early as November 19, 1965. *See* Assumption Agreement, Exhibit 11 in the Appendix for Materials Submitted by Jennings Water, Inc. [JWI] in Opposition to CSL's Motion for Summary Judgment and in Support of JWI's Motion for Summary Judgment ("Appendix"). "Both the Geneva and Muscatuck [3] [Water, Inc.] systems were financed by loans from the [FmHA]." *City of North Vernon,* 895 F.2d at 312. "In 1977, Geneva and Muscatatuck Water Company merged, creating Jennings, a rural water association that now sells water to CSL." Plaintiffs' Brief, p. 2. "In October, 1977, Jennings itself obtained an additional loan from the FmHA. . . ." *City of North Vernon,* 895 F.2d at 312.

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[3] Court's footnote: Both "Muscatuck" and "Muscatatuck" have been used in the parties' submissions and in prior court decisions.

The plaintiffs argue that only the 1977 loan originally made to Jennings should be considered in determining whether a private franchise was granted during the term of an FmHA loan, and that since CSL Utilities was granted a franchise before 1977, section 1926(b) has not been violated. Jennings responds that the pre-1977 FmHA loans made to Geneva predate CSL Utilities' existence and implicate section 1926(b)'s prohibition. Jennings provided evidence (in the form of copies of assumption agreements found in the Appendix as exhibit 11) that it assumed the FmHA indebtedness of Geneva and the Muscatatuck Water Company on October 21, 1977.

The plaintiffs do not dispute that this assumption of indebtedness occurred. Instead, they argue that Jennings is a separate entity from Geneva, and that the mere fact that Jennings might consider itself a successor to Geneva does not resolve the section 1926(b) issue.[4] However, the fact that FmHA loans to Geneva and the Muscatatuck Water Company were assumed by Jennings indicates that these loans continued in existence from the date of their origin (predating the incorporation of CSL Utilities) through the date in October, 1977, on which they were assumed by Jennings. The plaintiffs do not explain why an agreement between the FmHA and an association to make a loan is an operative event for analyzing section 1926(b) but an agreement between the FmHA and an association to assume a loan should have no effect.

It is true, as the plaintiffs argue, that section 1926(b) does not explicitly discuss assumptions of loans; rather, the statutory prohibition just applies where private franchises are granted during the terms of FmHA loans to associations. However, the facts of this case seem to be encompassed by the language of section 1926(b) in that

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[4] The plaintiffs also argue that Geneva merely piped North Vernon's water to others, but they do not explain (and this court cannot see) why this description of Geneva's service is relevant to understanding section 1926(b).

a private franchise was granted to CSL Utilities during the term of FmHA loans. The plaintiffs are arguing in effect that the assumption of the loans by Jennings means that the prior existence of the loans should be completely ignored, but the plaintiffs have offered no support for departing from the plain meaning of the statutory provision to reach such a result.

This court's conclusion that FmHA loans predating CSL Utilities' franchise should be considered for section 1926(b) purposes is consonant with the broad reading of section 1926(b) given by other courts. Indeed, as noted by this court in its November 14, 1990 Entry, the Seventh Circuit has observed that "the federal statute, section 1926(b), absolutely bars any encroachment by a competing water system indebted to the FmHA." *City of North Vernon,* 895 F.2d at 318, n. 6. *See also City of Madison v. Bear Creek Water Ass'n,* 816 F.2d 1057, 1059 (5th Cir.1987) (section 1926(b) "unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion."), *cited with approval in Glenpool Utility Serv. v. Water District No. 2,* 861 F.2d 1211, 1214 (10th Cir.1988), *cert. denied,* 490 U.S. 1067, 109 S.Ct. 2068, 104 L.Ed.2d 633 (1989).

Construing section 1926(b) so as to protect Jennings from competition also accords with the legislative intent in enacting this section, which was "to assist in protecting the territory served by . . . an association . . . against competitive facilities. . . ." S.Rep No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.Code Cong. & Admin. News 2243, 2309.

The plaintiffs argue that "[t]here is no need to reach back in time and prevent competition by private franchises that pre-date the merger, because the FmHA took their existence into consideration when it decided the Jennings project should proceed" in 1977. Combined Response, p. 12. This argument, similar to the argument

(previously raised and rejected by Judge Dillin) that Jennings was not relying on what CSL Utilities considered to be its customers, is a policy argument appropriately addressed to Congress but not material to the court's construction of section 1926(b). As Judge Dillin wrote, "The statute['s] . . . applicability does not hinge on whether specific customers or areas were listed on or deleted from the loan forms or on the financial impact of the service decrease on the rural association." *Jennings Water, Inc. v. City of North Vernon*, 682 F.Supp. at 425.

The plaintiffs also argue that since their proposed water system does not encroach on the service provided by Geneva, and since CSL Utilities had its own customer base before Jennings came into existence, the Geneva FmHA loans should not prohibit their project. The plaintiffs offer no support for this novel and narrow reading of section 1926(b), and they do not dispute that Jennings assumed Geneva's FmHA loans and that Jennings is "made up of Geneva and Muscatatuck." Combined Response, p. 10. The plaintiffs do argue that the Country Squire Lakes customers always belonged to CSL Utilities, an argument which, as noted above, *see supra* p. 4, the plaintiffs already lost. In the end, it is undisputed that Jennings' service to CSL Utilities would be curtailed if CSL Utilities were to decrease the amount of water it received from Jennings by supplying its own. Section 1926(b) prohibits this result.

The plaintiffs contend that in light of this prohibition, section 1926(b) works a violation of the Takings Clause of the Fifth Amendment by prohibiting the plaintiffs (and the Country Squire Lakes homeowners) to make full use of their land and water. The plaintiffs did not raise these allegations in their complaint, however, and no motion for leave to amend has been placed before the court. Moreover, Jennings is not the appropriate defendant against which to raise such a claim. Accordingly, this argument carries no weight here.

CONCLUSION

CSL Utilities is prohibited from developing its own water system, as the effect of such a project would be that a private franchise would be curtailing the service provided by an association indebted to the FmHA, Jennings. Accordingly, the plaintiffs' motion for summary judgment is denied, and the defendant's motion for summary judgment is granted. The plaintiffs' motion to take judicial notice of a petition before the Indiana Utility Regulatory Commission, the defendant's ensuing motion to strike, and the motion to strike the Rupel affidavit, all pertaining to matters not essential to the court's resolution of this matter, are denied as moot.

It is so ORDERED.

Supreme Court, U.S.
FILED
JUN 23 1994
OFFICE OF THE CLERK

(3)

No. 93-1869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JENNINGS WATER, INC.,

Petitioner,

v.

CSL UTILITIES, INC. and
CSL COMMUNITY ASSOCIATION, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES THE DEVELOPMENT OF WATER RESOURCES BY A UTILITY CONSTITUTE SERVICE SIMILAR TO THE SERVICE PROVIDED BY A WATER ASSOCIATION WHICH SELLS WATER WHOLESALE TO THAT UTILITY?

II. DOES THE GRANT OF PERMITS TO CONSTRUCT A WATER PRODUCTION AND TREATMENT FACILITY BY A STATE CONSTITUTE THE GRANT OF A PRIVATE FRANCHISE TO PROVIDE WATER SERVICES?

III. DOES 7 U.S.C. §1926(b) PROHIBIT A COMMUNITY FROM DEVELOPING ITS OWN WATER RESOURCES IN LIEU OF PURCHASING WATER WHOLESALE FROM A WATER ASSOCIATION?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents, CSL Utilities, Inc. and CSL Community Association, Inc.,[1] respectfully pray that the Petition For Writ Of Certiorari filed by Jennings Water, Inc. to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case be denied. A copy of the opinion of the Court of Appeals, as well as the opinion of the District Court for the Southern District of Indiana regarding this matter, were submitted by the Petitioner. The Respondents agree with the statement of jurisdiction made by the Petitioner in its Petition.

STATEMENT

Most of the facts relevant to the Petition are set forth in the Petition and in the opinions of the lower courts. In the interests of brevity, all of the pertinent facts will not be restated here. However, some supplementation is necessary.

CSL Utilities, Inc. ("CSL") is a privately owned utility incorporated on December 17, 1974. CSL Community Association, Inc. ("Community Association") is a not-for-profit association made up of homeowners in the residential neighborhood known as Country Squire Lakes, which is located in Jennings County, Indiana. CSL was formed to provide water to Country Squire Lakes, which it has been doing since the subdivision was developed in 1975.

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[1]CSL Utilities, Inc. is a wholly-owned subsidiary of Hidden Valley Lake, Inc. CSL Utilities, Inc. has no subsidiaries. CSL Community Association, Inc. has no parent or subsidiary corporations.

Prior to that time, there were no water customers in that area. To the extent CSL was granted a private franchise to provide water services, that grant occurred in 1974 when CSL was formed.

CSL built the water delivery system necessary to serve its customers in Country Squire Lakes with the intent that CSL would build its own water purification and delivery system in the future. However, Country Squire Lakes was not settled overnight. Because of the sparse population of the subdivision in its early stages, an entirely new water facility was impractical and unjustified. Therefore, CSL decided to purchase the water needed by Country Squire Lakes from Geneva Township Water Corporation wholesale, which, in turn, purchased water from the City of North Vernon, Indiana. When Jennings Water, Inc. ("Jennings") was formed in 1977, it assumed Geneva's agreement to sell water wholesale to CSL.

In the process of its formation, Jennings applied for, and received, an $898,000 loan from the Farmer's Home Administration (FmHA). In order to support its application, Jennings invited CSL to participate in the construction of its new water facility. However, CSL declined to sign a long-term water supply contract with Jennings. CSL still wanted to build its own water facility, and wanted the flexibility to remain a temporary wholesale purchaser until it could justify building its own facility. CSL made Jennings aware of its intentions. CSL also informed the FmHA of its decision not to participate in the Jennings project before the loan was granted, and Jennings modified its loan applications and engineering reports in order to acknowledge that CSL may not be a Jennings wholesale customer in the future. With this information in hand, the FmHA issued its loan to Jennings.

The residents of Country Squire Lakes are the water customers of CSL, not Jennings. Jennings has no direct contact with Country Squire Lakes residents. CSL built, maintains, and repairs the water delivery system which services the neighborhood. CSL handles all billings and collections for the water services they provide. CSL sets its own rates, which are then approved by the Indiana Utility Regulatory Commission ("IURC"). Jennings' service area map does not include Country Squire Lakes, nor does Jennings' annual report include the Country Squire Lakes residents within its reported customer base.

Jennings' water supply charges are based upon its costs to provide water service plus a reasonable profit. With regard to customers other than Country Squire Lakes residents, Jennings provides the services discussed above themselves. However, with regard to Country Squire Lakes, those services are provided by CSL, as noted. Thus, Country Squire Lakes residents are essentially charged twice for those services, subsidizing the other Jennings customers.

In March of 1987, the IURC granted Jennings permission to raise its rates for supplying water to Country Squire Lakes residents by approximately one hundred percent (100%). CSL had two alternatives to this drastic cost increase: select another wholesale provider or build the water facility it had always envisioned. CSL's attempts to negotiate directly with the City of North Vernon, Indiana for wholesale water was found to be in violation of 7 U.S.C. §1926(b) by the District Court for the Southern District of Indiana and the United States Court of Appeals for the Seventh Circuit. *Jennings Water, Inc. v. City of North Vernon, Inc., 895 F.2d 311 (7th Cir. 1989) ("Jennings I").* CSL instituted this lawsuit to establish that the construction of its own water facility would not violate the same statute. It is less expensive for CSL Utilities and its customers in

Country Squire Lakes to build a brand new system and amortize the costs over a ten year period than to pay the rates currently being charged by Jennings.

REASONS FOR DENYING THE PETITION

I. THE DEVELOPMENT OF WATER RESOURCES BY THE WHOLESALE WATER CUSTOMER OF A WATER ASSOCIATION HOLDING AN FmHA LOAN DOES NOT VIOLATE THE PROHIBITIONS OF 7 U.S.C.§1926(b).

7 U.S.C. §1926(b) does not flatly prohibit all competition with, or curtailment of, services provided by water associations holding FmHA loans. Had Congress desired to enact such a law, it would have been a simple thing to do, and the statute would have been far more brief. However, it is apparent from the language of the statute that Congress did not have that intent. Instead of selecting a flat prohibition of all competition, Congress chose to prohibit two specific types of competition. First, Congress prohibited the limitation or curtailment of water services provided by a water association holding an FmHA loan "by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body . . . ." 7 U.S.C. §1926(b). That portion of the statute is not at issue here, as it is undisputed that CSL is not a "municipal corporation or other public body."

Second, Congress prohibited the limitation or curtailment of water services provided by a water association holding an FmHA loan "by the granting of any private franchise for similar service within such area during the term of such loan . . . ." 7 U.S.C. §1926(b). The Seventh Circuit noted that the private franchise restriction within the statute contained three separate components: (1) the

curtailment of the association's service area (2) by a private franchise for similar service (3) that was granted during the term of the FmHA loan. *Jennings Water, Inc. v. CSL Utilities, Inc. and CSL Community Association, Inc.*, 16 F.3d. 130 (7th Cir. 1993) *("Jennings II")*. CSL and the Community Association contend that its proposed construction of a water facility, which would admittedly reduce its need for Jennings' wholesale water, would not satisfy any of these components. Although the Seventh Circuit found for the Respondents, it held that only one of the components of this prohibition was not satisfied. Specifically, the Court below held that the permission of the State of Indiana to build a water facility does not constitute the grant of a private franchise for similar service. *Id.*, at 137. However, CSL does not waive any of the arguments it made below. Jennings' Petition should be denied because *none* of the components of the private franchise restriction found in 7 U.S.C. §1926(b) have been met in this case.

A. A Community's Development of Its Own Water Resources Is Not Service Similar to the Wholesale Supply of Water to a Retail Water Supplier.

In *Jennings II*, the Seventh Circuit found that Country Squire Lakes is within Jennings' service area for purposes of the statute. CSL and Community Association believe that the Seventh Circuit's analysis of this component of the private franchise restriction was oversimplified, leading to an incorrect result.

Jennings provides one "service" -- it sells water wholesale to CSL. This simply involves hooking up one pipe to the CSL system, turning the valve on, and monitoring the water flow. CSL, not Jennings, built, repairs, and maintains the water delivery system. CSL, not

Jennings, handles all of the administrative duties such as billing and collection. CSL, not Jennings, proposes and obtains approval for the rates charged for water services provided to the residents of Country Squire Lakes. The Country Squire Lakes residents are, and always have been, customers of CSL, not Jennings. Jennings does not include Country Squire Lakes within its service area map, and Jennings does not include the residents of Country Squire Lakes in its annual report as part of its customer base.

Since Jennings does not provide any direct services to the residents of Country Squire Lakes, it is not possible that these are the functions which are allegedly being limited or encroached upon by CSL and the Community Association. The question then becomes: what *is* the service which Jennings claims is being curtailed? The only "service" which Jennings provides is wholesale water. The entity to which the water is provided is CSL, not the residents of Country Squire Lakes. Therefore, the only service allegedly being limited by the construction of a water utility is the service which Jennings provides CSL.

The District Court and Seventh Circuit found that CSL's attempt to purchase water from the City of North Vernon, Indiana would have been an encroachment on Jennings' service area by an entity providing a similar service. *Jennings I*, 895 F.2d at 311. That is not the case here. Jennings provides no services to the residents of Country Squire Lakes, and is not being supplanted by another third party wholesale water provider. Rather, through the development of its own resources, CSL will evolve from a wholesale water purchaser to a water producer. Jennings' "service area" is the wholesale provision of water to CSL. Jennings' service area is not being limited or curtailed by another entity providing similar service; the service is being made unnecessary because

Jennings' customer, CSL, will no longer require such a service. The statute protects Jennings against encroachment by third parties, it does not give Jennings the right to provide a service which is no longer needed.

Ironically, the only reported case which touches upon one of the issues raised in this case comes from the Indiana Court of Appeals. In *Watson Rural Water Company, Inc. v. Indiana Cities Water Corp.*, 540 N.E.2d 131 (Ind. App. 1989), Watson, like Jennings, attempted to carve out a new service area for itself by using 7 U.S.C. §1926(b). Watson was a not-for-profit Indiana corporation which engaged in water distribution in rural Clark County, Indiana. Watson, like Jennings, was started with funds from the FmHA. In 1974, Watson attempted to obtain a private franchise from the State of Indiana to provide water to a tract of land in Clark County. The attempt failed when the Indiana Utility Regulatory Commission (IURC) denied Watson's petition and granted the private franchise to Indiana Cities Water Corporation. Despite this fact, Watson began providing water service in 1985 to the Jeffersonville Hospital, which was under construction on the same piece of land. While providing this service, Watson again petitioned for a private franchise from the IURC to provide water service to this area. The IURC denied Watson's petition once again.

Indiana Cities filed a complaint seeking damages and a permanent injunction to enjoin Watson from providing water to the hospital. Watson, like Jennings, claimed that the hospital was now within its service area pursuant to 7 U.S.C. §1926(b), and that no third-party had the right to encroach upon that service area. The trial granted summary judgment to Indiana Cities. On appeal, the Indiana Court of Appeals held that Watson's claim of protection under 7 U.S.C. §1926(b) was barred by the doctrine of res judicata, as the IURC had already found that statute inapplicable. *Id.*,

at 138. Nevertheless, the Court went on to determine that the IURC made the correct decision.

The Indiana Court of Appeals held that the Jeffersonville Hospital was not within Watson's service area, despite the fact that Watson was currently serving the hospital:

> Watson's territory did not include the hospital and other disputed areas prior to the time Watson sought a certificate of public convenience and necessity. . . . It is our opinion that absent some prior territorial claim or proceeding, the mere existence of a transmission line will not cause all areas accessible from that line to be enveloped within the rural water utility's service area.

Id., at 138.

Jennings and Watson are in the same position. Watson attempted to carve itself out a new service area by supplying water to the Jeffersonville Hospital, and then hiding behind the protections of 7 U.S.C. §1926(b). However, the mere fact that Watson was serving the hospital did not mean that the hospital was within its service area. Rather, the right to serve the hospital, and all other water users on that particular tract of land, had been given to Indiana Cities earlier. The fact that Watson later provided the water did not change that fact. Here, CSL, not Jennings, holds the private franchise to serve the residents of Country Squire Lakes. The fact that Jennings later provided wholesale water to CSL for delivery to its customers does not change the fact that CSL holds the right to provide water service to those customers.

This decision by the Indiana Court of Appeals by no means bound the lower courts which decided this case, and it certainly does not bind this Court. However, the logic of the opinion is unflawed. CSL built the water delivery system for the Country Squire Lakes subdivision, and CSL operates that system. The only connection Jennings has with the residents of that subdivision is indirect at best. The evidence shows that Jennings itself does not even consider Country Squire Lakes as part of its service area. The courts below erred when they held that the residents of Country Squire Lakes were within the service area of Jennings rather than CSL.

B. The Issuance of Permits to Build a Water Production and Treatment Facility Does Not Constitute The Granting of A Private Franchise.

In *Jennings II,* the Seventh Circuit correctly held that the issuance of construction permits by subdivisions of the State of Indiana does not constitute the granting of a private franchise. Jennings fails to contest this finding in its Petition, choosing instead to focus upon the fact that some of the reported case law regarding 7 U.S.C. §1926(b) has indicated that it should be read broadly to protect water associations. CSL generally agrees with such a construction. However, Congress did not flatly prohibit all competition, encroachment, or curtailment of services provided by protected water associations.

Much of Jennings' Petition is nothing more than a plea for an absolute prohibition on all curtailments, limitations, or encroachments upon the service areas of protected water associations. Whether or not such a policy would be beneficial or not is irrelevant here. The simple fact is that when Congress drafted 7 U.S.C. §1926(b), they

drafted a generally protectionist statute which has its limits. Those limits must be respected.

The language of the statute must be honored. In a statutory construction case, the beginning point is the language of the statute. When a statute speaks with clarity to an issue, judicial inquiry is finished in all but the most extraordinary circumstances. *Estate of Cowart v. Nicklos Drilling Company*, 112 S. Ct. 2589, 2593 (1992). The Court is obligated to give effect to the unambiguously expressed will of Congress. *Negonsott v. Samuels*, 113 S.Ct. 1119, 1122-1123 (1993); *Norfolk and Western Railway Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1162 (1991). Otherwise stated, if the language of a statute is unambiguous, the Court need look no further for an interpretation. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Estate of Cowart*, 112 S.Ct. at 2593.

The portion of 7 U.S.C. §1926(b) applicable to this case is clear and unambiguous. With regard to this lawsuit, it prohibits a curtailment or limitation of the services provided by a protected water association through the grant of a private franchise. CSL was granted its franchise to supply water to Country Squire Lakes residents when that development was first created in 1974. The State's authority to approve construction plans for the water treatment facility proposed by CSL is limited to approval of the construction and environmental safety of the plans. It does not contemplate a State review or decision concerning the right of the utility to supply water to its customers, or the appropriateness of the decision to use its own water. The mere issuance of specialized building permits does not constitute the grant of a private franchise, as the Seventh Circuit Court of Appeals correctly held. Therefore, Jennings' Petition should be denied.

C. 7 U.S.C. §1926(b) Does Not Prohibit Communities From Developing Their Own Water Systems.

7 U.S.C. §1926(b) does not apply to situations where communities such as the Community Association wish to supplant wholesale water suppliers by developing their own water resources. The statute contemplates the intervention of an outside third-party as prohibited conduct. If this Court were to adopt the strained reading of the statute urged by Jennings, it would discourage the development of rural water resources and encourage high prices for water, thwarting the very purpose of the statute.

In enacting this statute, the intent of Congress was to promote the development of water resources and to reduce the cost of water to the users:

> This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and other in rural communities. By including service to other rural residents, *the cost per user is reduced* and the loans are more secure in addition to *the community benefits of a safe and adequate supply of running household water.*

S. Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U. S. Code Cong. & Admin. News 2243, 2309.

The facility proposed by CSL and the Community Association will reduce the cost of water to the residents of Country Squire Lakes by developing their own water source, thus expanding the water supply. Thus, both purposes of the statute, as expressed by Congress, will be furthered.

Adopting Jennings' position would create an absurd result. The residents of Country Squire Lakes would be prohibited from using their own water resources to supplement their service from Jennings. Taken to its logical extreme, no farmer who purchased water from a protected water association could irrigate his field with an irrigation pond or well. Under the construction urged by Jennings, such an act would constitute a limitation or curtailment of Jennings' service. Certainly, Congress did not intend the protectionist nature of the statute to extend so far that it denies landowners the right to use their own water resources.

The only reasonable interpretation of the statute is that it prohibits curtailment of service by outside third parties. To be precise, the statute prohibits curtailment by public bodies such as municipal corporations, as well as private franchises created by public bodies, which seek to prey upon established water service areas. A construction which prohibits water consumers from developing and using their own water resources would be contrary to the stated intent of Congress in enacting this legislation and would further contravene public policy.

II. THE CASE LAW CITED BY THE PETITIONER IS DISTINGUISHABLE FROM THE CASE AT BAR

Jennings cites several cases which it claims support its tortured construction of 7 U.S.C. §1926(b). However, a closer examination of these cases reveals that they are not on point. None of them deal with the private franchise portion of 7 U.S.C. §1926(b) which is at issue here. Rather, each of these cases concern the portions of the statute which restrict encroachment by municipalities and other public bodies. Therefore, these cases are inapplicable here.

For instance, Jennings cites *City of Madison, Mississippi v. Bear Creek Water Ass'n Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987) in support of its position. In *City of Madison*, the plaintiff, a city, brought eminent domain proceedings to condemn the facilities of the defendant, a water association that was indebted to the FmHA. At issue in this case was a portion of land which the indebted water association had previously and exclusively served, but which had since been enveloped by the nearby growing city of Madison. The city then instituted the eminent domain proceedings in an attempt to condemn the water association and acquire the right to provide water for the disputed area. The water association petitioned for summary judgment on the grounds that since they were indebted to FmHA, the application of 7 U.S.C. §1926(b) would bar the city's condemnation proceeding. *Id.* at 1058. The water association's plea for summary judgment was awarded and affirmed on appeal. *Id.* at 1061. When construing the language of 7 U.S.C. §1926(b), the court solely addressed the issues of municipal encroachment upon indebted water associations and did not discuss the private franchise clause which is the subject of the dispute currently at bar.

Jennings also cites *Moore Bayou Water Association v. Town of Jonestown*, 628 F. Supp. 1367 (N.D. Miss. 1986). In this case, a town threatened to institute eminent domain proceedings against an FmHA-indebted rural water district if they did not agree to sell their exclusive service rights and water facilities for a satisfactory price. At issue was an area of land which had been serviced by the water association and later annexed by the town. In response to the threats, the association brought suit against the town, seeking declaratory and injunctive relief. In granting the association's Motion for Summary Judgment, the district court held that the town's actions amounted to a curtailment or limitation of the service provided by the association, in

violation of that portion of 7 U.S.C. §1926(b) which prohibited encroachment by public bodies such as municipal corporations. *Id.* at 1370. The decision did not address a curtailment or limitation by the granting of a private franchise.

Jennings further cites *Glenpool Utility Services v. Creek County Rural Water District*, 861 F.2d 1211 (10th Cir. 1988), cert. denied, 490 U.S. 1067 (1989). In *Glenpool*, the plaintiff, a municipality, sought a declaratory judgment that it had the exclusive right to service the disputed area. The FmHA-indebted rural water district counterclaimed for a declaratory judgment that it had the exclusive right to service this area. While the district court held that neither party had the exclusive right to service the disputed area, the appellate court reversed and held that 7 U.S.C. §1926(b) barred the municipality from annexing the disputed area as a tool to provide water service to its residents. *Id.* at 1214. As in the other cases cited by Jennings, the *Glenpool* court addressed only the issue of municipal encroachment and never discussed the private franchise clause of 7 U.S.C. §1926(b).

Finally, Jennings cites *Rural Water District #3 v. Owasso Utilities Authority*, 530 F. Supp. 818, 823 (N.D. Okl. 1979). As in the other cases relied on by Jennings, *Rural Water* involved a suit brought by a rural water district against a city utility for infractions resulting from the city utility's encroachment into the area serviced by the FmHA-indebted, rural water district. The Court specifically declared that the private franchise restriction was not at issue. *Id.*, at 822. While declaring that the private franchise clause was not at issue in the *Rural Water* case, the court stated:

> The Court finds that the purpose of §1926(b), as reflected by the legislative history, is clear, i.e., 'protecting the territory served by such an association facility *against competitive facilities* which might otherwise be developed with the expansion of the boundaries of *municipal and other public bodies* into an area served by the rural system.'

Id. at 823 (emphasis supplied).

Unlike the plaintiffs in the cases cited by the Petitioner, CSL is not a municipal corporation. The issue in the above cases was the curtailment or limitation of a FmHA-indebted water association's services as a result of municipal annexation or inclusion. The prohibition of that type of encroachment can be found in the first portion of 7 U.S.C. §1926(b). The issue in the present case is the private franchise restriction of 7 U.S.C. §1926(b), which is a separate and distinct portion of the statute. For this reason, these cases are not pertinent here.

Of equal importance is the fact that each of the cited cases involved a newly created water utility attempting to move into a service area previously served by the indebted association, or a nearby existing utility expanding its service area into the indebted association. This case involves a utility (CSL) which has been in existence for twenty (20) years continuing to serve the same customers it has always served. The issue is the utilities' right to process its *own* water resources. 7 U.S.C. §1926(b) was never intended to allow a utility like Jennings to effectively annex an existing neighboring system, without compensation, by forbidding the residents served by that system from using their own water resources.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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No. 93-1869

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JENNINGS WATER, INC.,
Petitioner,

v.

CSL UTILITIES, INC. and CSL COMMUNITY ASSOCIATION, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

SUMMARY OF ARGUMENT

CSL Utilities, Inc. Reply Brief is non-responsive to Jennings Water, Inc.'s argument that a Writ of Certiorari should be granted to address the important Federal Government interests implicit in 7 U.S.C. § 1926(b) which were ignored by the Court of Appeals. Respondent's brief simply reargues the merits of the case instead of responding to petitioner's arguments which identify substantial interests of the Federal Government which were not considered by the Court of Appeals. CSL Utilities, Inc. improperly raises issues decided previously by two Courts of Appeals and two District Courts, makes factual assertions unsupported by the record and cites cases which

have no relevance to Jennings Water, Inc.'s argument in support of the grant of a Petition for Writ of Certiorari.

I. RESPONDENTS IMPROPERLY CHALLENGE THE "SERVICE AREA" DETERMINATION OF THE COURT OF APPEALS WITHOUT FILING A CROSS-PETITION FOR CERTIORARI.

Respondents improperly challenge the conclusion of the Court of Appeals that Country Squire Lakes is within Jennings Water, Inc. ("Jennings") service area. This issue has been decided against the respondents in all prior litigation between these parties. *See Jennings Water, Inc. v. CSL Utilities, Inc. and CSL Community Association, Inc.*, 16 F.3d 130, 133 (7th Cir. 1993); *Jennings Water, Inc. v. City of North Vernon*, 682 F.Supp. 421, 424 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311, 318 (7th Cir. 1989); *CSL Utilities, Inc. v. Jennings Water, Inc.*, 807 F.Supp. 490, 492 (S.D. Ind. 1992). *All* the courts that have addressed this issue between *these* parties since 1988 have consistently held that CSL is a wholesale customer of Jennings and that Country Squire Lakes is within Jennings' service area. CSL's improper argument to the contrary should be rejected because it violates a fundamental rule of Supreme Court practice and procedure. "If a respondent wishes to overturn portions of the judgment which are unfavorable to him, he must file a separate petition for certiorari. This must satisfy all the requirements for any petition for certiorari." *See Robert L. Stern, Eugene Gressman, and Supreme Court Practice*, § 6.35 (6th Ed. 1986). CSL's failure to file a cross-petition on the finding of the Court of Appeals renders such argument as improper.

Likewise, CSL objects to the Court of Appeals decision in favor of Jennings finding that CSL violated two (2) of the three (3) components of the private franchise prohibition of 7 U.S.C. § 1926(b). Those were:

1. That CSL's actions will curtail Jennings' service area. 16 F.3d at 133-134; App. 5(a).

2. CSL was granted a private franchise during the term of the Jennings' loan from the FmHA. 16 F.3d at 134; App. 7(a).

These issues are foreclosed from argument or appeal by CSL. *See Stern, supra,* at § 6.35.

II. RESPONDENTS' RELIANCE UPON *WATSON RURAL WATER COMPANY, INC. v. INDIANA CITIES WATER CORP.*, 540 N.E.2d 131 (Ind.App. 1989) IS MISPLACED.

CSL's persistence in arguing that Country Squire Lakes was not within Jennings service area renders much of its brief irrelevant. For example, CSL relies almost exclusively on one intermediate Indiana appellate opinion, *Watson Rural Water Co., Inc. v. Indiana Cities Water Corp.*, 540 N.E.2d 131 (Ind.App. 1989) for the proposition that 7 U.S.C. § 1926(b) does not protect Jennings' right to serve CSL. However, the case deals with the facts as CSL wishes they were, not as the two appellate court and two district court decisions in this litigation found them to be.

CSL cites the opinion of *Watson* for the proposition that 7 U.S.C. § 1926(b) does not protect a FmHA indebted water association that attempts to "carve itself out a new service area". Respondents' Brief in Opposition, p. 8. *Watson* primarily addressed the *administrative res judicata* effect of *previous* IURC ruling against *Watson* on the service area question. *Id.* at 136. Having failed to appeal the IURC administrative ruling, the Indiana Court of Appeals held: "Therefore, Watson was estopped from claiming in a subsequent court proceeding that the Commission was without jurisdiction." *Id.* 137.

In addition, whereas this case deals with a utility activity clearly within the scope of 7 U.S.C. § 1926(b) and the protection of a pre-existing service area, *Watson* dealt with an activity outside of the scope of the statute. In contrast to the facts of *Watson,* Jennings is not trying

"use the *protective shield* provided by 7 U.S.C. § 1926 (b) as a sword to cut out a new market for its services." 540 N.E.2d 131 at 137 (emphasis added).

Never has there been such a finding between the two parties herein. In fact, just the opposite. Every court of law that has addressed the issue has determined that CSL was part of the Jennings service area. *Watson* is of no help to the respondents.

III. RESPONDENTS' ASSERTION THAT PETITIONER HAS WAIVED ITS RIGHT TO CONTEST THE COURT OF APPEALS CONCLUSION THAT THERE WAS NO GRANT OF A PRIVATE FRANCHISE MISUNDERSTANDS THE FUNCTION OF A PETITION FOR A WRIT OF CERTIORARI.

Respondents' misunderstanding of the office of the Writ of Certiorari petition is reflected by its surprising argument that Jennings has waived its right to argue the merits of the case. This argument lacks any merit because a Petition for a Writ of Certiorari is different from a Supreme Court brief on the merits.

Respondents state correctly that the Court of Appeals held that the issuance of construction permits by Indiana agencies did not constitute the granting of private franchise. Respondents then go on to assert that "Jennings fails to contest this finding in its Petition. . . ." Brief in Opp., p. 9.

This assertion is simply wrong as a matter of Supreme Court practice and procedure. It fails to grasp the difference between the argument required in a petition for writ of certiorari and a brief on its merits. Jennings correctly observed this distinction in its Petition for a Writ of Certiorari. Jennings' Petition for Writ of Certiorari argues that the determination of whether CSL has a right to stop purchasing water from Jennings so it can develop its own supply involves important federal issues not considered by the Court of Appeals. In its Brief on the Merits, Jennings

will argue that the Court of Appeals incorrectly constructed the statutory term "granting of any private franchise" to allow CSL to compete with Jennings. The Petition for Writ of Certiorari correctly concentrated on the federal interests relevant to the construction of this term rather than a full presentation of the technical merits of petitioner's argument. In short, no argument on its merits has been waived.

IV. RESPONDENTS HAVE INCORRECTLY CHARACTERIZED THE STATUTE AT ISSUE, 7 U.S.C. § 1926, AS UNAMBIGUOUS.

CSL's characterization of the statute as unambiguous finds no support in the language of the statute or in the opinion of the Court of Appeals. The Court of Appeals noted that the application of the statute to prevent CSL from providing its own water supply "presents close and difficult problems." 16 F.3d at 133; App. 4a. The Court of Appeals recognized that the statute was ambiguous and construed the term franchise by applying familiar canons of statutory construction. The Court of Appeals first turned to the words of the statute and noted that "the term 'franchise' is not amenable to precise definition." 16 F.3d at 135; App. 8a. It then constructed the statute by reading the statute as a whole in the context of "[t]he cases and fragments of legislative history" and accepted theories of public utility law. 16 F.3d at 135; App. 9a. Petitioner, of course, disagrees with the Court of Appeals' decision on the merits but not with its method of statutory construction.

Respondents' argument appears to turn on a single statement by the Court of Appeals at the end of its analysis of the meaning of the term "franchise." To bolster its construction of the statute based on language, legislative history and prior cases interpreting it, the Court of Appeals observed that: "No doubt the statute is intended to be broadly protectionist, but there are degrees of protec-

tionism which its plain language does not reach." 16 F.3d at 137; App. 12a. The Court of Appeals did not apply the "plain meaning rule" as set out in cases such as *Estate of Cowart v. Nicklos Drilling Company*, 505 U.S. ——, 112 S.Ct. 2589 (1992) because 7 U.S.C. § 1926(b) is couched in general language and Congress made no effort to anticipate in detail the entire range of situations in which a FmHA-indebted rural water association is entitled to Congressionally mandated protection from competition. There is no need to belabor this point since respondent's Brief in Opposition ultimately abandons reliance on the plain meaning rule. It argues that the Court of Appeals' decision is correct because it is the "only reasonable interpretation" based on legislative history and the underlying purpose of the statute. Petitioner disputes the conclusion on the merits, but agrees with the Court of Appeals and respondent that resort to the language of the statute alone, without any inquiry into its context, cannot resolve the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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